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Supreme Court of the United States

OCTOBER TERM, 1937

GUARANTY TRUST COMPANY OF NEW YORK,
EXECUTOR OF THE ESTATE OF MARY T. RYAN,
DECEASED, *Petitioner;*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent.*

Brief on Behalf of the Commonwealth of Virginia in Opposition to the Granting of the Writ of Certiorari

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Richmond, Virginia,
12th of March, 1938.

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vs.

COMMONWEALTH OF VIRGINIA, *Respondent.*

Brief on Behalf of the Commonwealth of Virginia in Opposition to the Granting of the Writ of Certiorari

It is respectfully submitted by the Attorney General of Virginia, on behalf of the Commonwealth of Virginia, that the petition for the writ of certiorari should be denied for the following reasons:

First: The petition was not filed in time;

Second: The lower court's decision is plainly right.

SUMMARY OF ARGUMENT

Final judgment of the court below was entered on November 11, 1937, and petition for writ of certiorari was filed in this court on February 21, 1938, more than three months subsequent to the entry of such final judgment. Therefore, writ of certiorari should be denied because not filed within the prescribed time.

Petitioner's decedent, Mrs. Mary T. Ryan, a resident of and domiciled in the State of Virginia, was during her lifetime assessed with a Virginia State income tax and included in the base of such tax was income received by Mrs. Ryan as beneficiary in part of a trust consisting of intangible property held, managed and controlled by New York trustees. The Virginia income tax is imposed upon its residents for the protection that they receive under its laws in their persons and in the receipt and enjoyment of their income and because they should bear their proportionate part of the expense of the government which affords this protection. The Virginia exaction is an excise tax imposed upon the person and not a tax upon property from which income may be derived. Mrs. Ryan was not denied due process of law by including in the base of the Virginia tax income received by her from the New York trust even though the trustees may have been taxed on account of the same income under the laws of New York, the jurisdiction of Virginia to impose its tax having been clearly established by this court, notably in *Lawrence* v. *Mississippi*, 286 U. S. 276, and *People of State of New York, ex rel. Cohn* v. *Graves*, 300 U. S. 308. The New York income tax on the trustees is imposed upon a different legal entity for different privileges and protection afforded under the laws of that State.

Denial of the equal protection of the laws was not raised or considered in the court below and should not be considered for the first time in this court. In any event, there is no denial of equal protection to Mrs. Ryan, since all persons similarly situated are taxed alike under Virginia law.

I

THE PETITION WAS NOT FILED IN TIME

The petition for the writ of certiorari was not filed in the Clerk's office of this court until the 21st of February, 1938.

It is respectfully asserted that the judgment complained of was entered on the 11th day of November, 1937, and that therefore the petition was not filed within the three months after the entry of that judgment as required by statute. R. S. 1008, as last amended by the Act of Feb. 13, 1925, c. 229, sec. 8 (a, b, d), 43 Stat. 940; 28 U. S. C. A. sec. 350. The three months period properly relates to the entry made on the 11th day of November, 1937, and that three months period ended on the 11th day of February, 1938, while the petition was not filed until the 21st day of February, 1938.

The Supreme Court of Appeals of Virginia has three places of session: One at Wytheville, one at Staunton and one at Richmond. Va. Code, 1919, section 5866. Cases arising in the Circuit Court of Nelson County, as this one did, are heard at the place of session of the Supreme Court of Appeals in Staunton. Va. Code, 1919, section 5869, as amended by Acts of Assembly, 1923, page 34.

This case was argued at Staunton, but the court took time to consider (R. 43) and then on the 11th day of

November, 1937, rendered its opinion (R. 45) at the place of the Richmond session and on the same day (R. 43, 44) directed the Clerk at Richmond to enter its order. It had authority to so enter its final order at Richmond, adjudicating the rights of the parties in a cause which was heard at Staunton. Sec. 5871 Va. Code, 1919, as quoted in petition for the writ, p. 9.

The last paragraph of the order (R. 44) so entered at Richmond on the 11th day of November, 1937, was as follows:

> "Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said Circuit Court."

The order of the 11th of November, 1937, was so certified to the Clerk at the place of session in Staunton in accordance with Section 5871 Va. Code, *supra*, and the record (page 43) shows the following:

> "IN VACATION:
>
> "In the Clerk's office of the Supreme Court of Appeals of Virginia at Staunton on Tuesday, the 23rd day of November, 1937.
>
> "The Clerk of the Supreme Court of Appeals of Virginia at Richmond certifies the following order in words and figures following, to wit:"
>
> [the order of the 11th of November, 1937, was then copied into the record at the Staunton office.]

The Clerk at Staunton simply spread upon his records the judgment which had been previously rendered and entered in Richmond. By the order of the 11th of November, 1937, the rights of the parties became conclusively fixed by the Supreme Court of Appeals of Virginia.

While no petition for a rehearing was filed in the Supreme Court of Appeals of Virginia, nevertheless, if one had been filed, it must have been filed within thirty days after the entry of the order in Richmond on the 11th of November, 1937. A petition for rehearing filed beyond the thirty days after the 11th of November, but within thirty days from the entry made at Staunton on the 23rd of November, 1937, would have been filed too late. This is plain from a reading of the Virginia statute (Va. Code, 1919, section 6372, as amended by Act of Assembly 1930, page 869), relating to such a petition for rehearing, which statute is as follows:

> **"Section 6372. When court of appeals may rehear and review case decided by it; when application therefor to be made; where rehearing, et cetera, to take place; where decision entered.** —The supreme court of appeals, on the application of a party, shall rehear and review any case decided by the said court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing; provided, however, that the application or petition for rehearing be filed within thirty days after the entry of the judgment, with the court, if the court be in session, and if not in session, shall be filed with the clerk at the place of session where the judgment was entered, who shall note the date of such filing on the order book. Such rehearing and review may

be at any place of session, and the judgment, decree, or order made thereon shall be entered on the order book where it is made, and if not made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below, to be by him entered as provided by section sixty-three hundred and sixty-nine."

The Rules of court refer to only one entry of a judgment or decree. This appears from a reading of Rule XVII, 167 Va. page XXXIII, where reference is to "the entry of the judgment or decree", not "the final entry", nor "the entry of the final judgment or decree", as would be the case if the court contemplated two or more entries.

The order of the 11th of November, 1937, was final for the purposes of the only rehearing available in the State courts and should be treated as final for the purpose of a petition for a writ of certiorari in this court.

The statutes of Virginia, as well as the Rules of the Supreme Court of Appeals of Virginia, refer to only one final entry and that is the one first made where the judgment was rendered.

The spreading of the order of the 11th of November on the books in Staunton on the 23rd of November was a mere ministerial act and did not fix or determine the rights of the parties to any extent. The Clerk at Staunton was not directed to certify the order of the 23rd of November, 1937, (for there was no such order), to the

Circuit Court, but was ordered to certify the order of the 11th of November, 1937, to the Circuit Court (R. 44). The only order entered was the order of the 11th of November and the only entry that conclusively fixed the rights of the parties was made on the 11th of November at Richmond.

When Chief Justice Campbell entered the order reviving the cause in the name of the Executor of the Estate of Mary T. Ryan, deceased, (R. 44) he understood that the rules of procedure and the law required that the petition for the writ of certiorari was being filed with respect to the action of his court "entered on November 11th, 1937". That was the entry that he referred to when he considered the matter as late as February 5th, 1938, the date of the entry of the order reviving the cause.

As to all of this, counsel for petitioner only says this, at bottom of page 9 of the Petition:

> "Thus while the order was dated November 11, 1937, it was not entered until November 23, 1937, which last date is the determination date from which the time begins to run."

It is difficult to reconcile his statement that the order was not entered until November 23 with the Record, pp. 43 and 44, which shows that on November 11th the opinion was rendered and the order pursuant thereto "ordered to be entered in the order book" at Richmond, and was so entered on the 11th of November. The court in its entry of its opinion of the 11th of November referred to the same as "this order", and in the order re-

viving the cause the court again referred to the action of the court "entered on November 11th, 1937."

Counsel for petitioner cannot, therefore, support his statement that the order was not entered until November 23, 1937.

Counsel for petitioner refers to two cases, *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, and *United States* v. *Gormez*, 1 Wall. 690. The facts in each of the two cases are entirely different from those here and it is not believed necessary to relate them here.

Wherefore it is smbmitted that the petition for a writ of certiorari was not filed in time and the writ should be denied for this reason.

II

THE LOWER COURT'S DECISION IS PLAINLY RIGHT

The four assignments of errors may be fairly treated as presenting two issues and it is respectfully submitted that the issues compel the following conclusions, namely:

A.

The Due Process Clause of the Fourteenth Amendment does not deny the right to Virginia to tax the income of its resident beneficiary, even though New York may have taxed the income of her resident trustees.

B.

The Virginia income tax against its resident beneficiary does not deny to her the equal protection of the law guaranteed her under the Fourteenth Amendment.

ARGUMENT ON THE MERITS

A.

The Due Process Clause of the Fourteenth Amendment does not deny the right to Virginia to tax the income of its resident beneficiary, even though New York may have taxed the income of her resident trustees.

Counsel for petitioner argues that New York has the unquestioned right to tax the Trustees on the income from the corpus in New York, and that the New York tax thereon precludes Virginia from taxing the income of the beneficiary. Such double taxation, he says, is forbidden by the Due Process Clause of the Fourteenth Amendment.

It is respectfully submitted that the decisions of this court approve Virginia's tax on Mrs. Ryan's income.

The argument of petitioner's counsel is based upon the premise that if two states tax the same income, (although the two taxes are levied against different legal entities for different privileges and protection afforded to each of them), one of the taxes violates the due process of law clause of the Fourteenth Amendment. That premise is not conceded by the Commonwealth of Virginia and it is submitted that the decisions of this

court show the premise to be unsound as applied to the facts of the instant case.

The New York tax on the trustees, based on the income received by them, is supported because the trustees and the corpus of the trust enjoyed the protection and privileges afforded them in New York by the New York laws. Such enjoyment is sufficient to sustain the New York Tax. *Lawrence* v. *Mississippi*, 286 U. S. 276.

On the other hand, the Virginia tax against petitioner is also supported by the same authority for the reason that it is based on her domicile and actual residence in Virginia. She was afforded by Virginia the protection in her person, in her right to receive the income and in the enjoyment of the income when received.

This court has already said that it could find no basis for holding that taxation of the income at the domicile of the recipient is within the purview of the rule now established that tangibles located outside the State of the owner are not subject to taxation within it. *Lawrence* v. *Mississippi, supra.*

On the other hand, counsel for petitioner in his brief on pages 15 and 16, on this point, discusses *Senior* v. *Braden*, 295 U. S. 422, *Maguire* v. *Trefry*, 253 U. S. 12, *Blackstone* v. *Miller*, 188 U. S. 189, *Fidelity & C. Trust Co.* v. *Louisville*, 245 U. S. 54, *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204, and *Safe Deposit and Trust Co.* v. *Virginia*, 280 U. S. 83, none of which cases involved an income tax, and draws the single conclusion therefrom by saying that the effect of *Senior* v. *Braden*, *supra*, "in disapproving *Maguire* v. *Trefry*, *supra*, was to hold that the assets of the trust and income from the trusts were localized at the domicile of the trust, and taxable only there" (Petition, p. 16).

The conclusion that the income was taxable only at the domicile of the trust loses its strength when it is considered that, so far as a diligent search reveals, no court has yet said that the same principles that are applicable to taxation of real estate, tangible property and intangible propery, govern also the taxation of income.

If the problem could be so readily solved, the difficulties of the forty-eight states would quickly disappear. There was a similar problem before this court in relation to inheritance taxes with respect to stocks in *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

Mr. Justice Sutherland there (284 U. S. 328) put the question and answer as follows:

> "In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple: * * * In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual situs."

While this court had such difficulty in fixing the situs of intangibles for inheritance tax purposes, counsel for petitioner unhesitatingly and rather dogmatically concludes, from a discussion of cases involving the taxation of property only, that income from a trust has only one situs, which is that of the corpus, and is taxable only in the State in which the corpus of the trust is located. Are the three leading income tax cases, *Lawrence* v. *Mississippi*, *supra*, *Shaffer* v. *Carter*, 252 U. S. 37, and *People of State of N. Y. ex rel Cohn* v. *Graves*, 300 U. S. 308, and their doctrines as to taxation of incomes, to be so readily overthrown by principles announced in

cases involving property? The last of these three cases was decided as late as March 1, 1937, and discussed the principles of the other two cases, as well as the other cases relied on by counsel for petitioner. And yet this court has not said anything which justifies the view that income has only one situs for tax purposes. It is respectfully submitted that income taxes are unique and require different governing principles.

Mr. Justice Eggleston, speaking for the court below, (R. 49) argues conclusively on this point as follows:

> "In *Hunton* v. *Commonwealth*, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in *People of the State of New York* v. *Graves, supra.*
>
> "In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her.
>
> "We think it is settled in *Lawrence* v. *State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374,* and in *People of the State of New York* v. *Graves, supra,* that the domicile and residence of the taxpayer in Virginia is a sufficient basis to sustain an income tax although the income so received and enjoyed by the taxpayer may have originated in another State."

Again from the same opinion, (R. 50-51):

> "It is argued with considerable force by the Attorney-General that both the New York and the Virginia income taxes can be sustained since they are levied on different taxable interests. The New York tax, it is said, is incident to the receipt of the income by the trustees in that State, while the Virginia tax is based upon Mrs. Ryan's receipt and enjoyment of the income in the latter State. The protection offered to the trustees and to the property handled by them in New York does not extend to the receipt and enjoyment of the income by Mrs. Ryan in Virginia. Each of these separate taxable interests should bear its proportionate part of the expenses of the governments of the respective States. Hence it is claimed neither of these taxable interests can complain of the levy on the other."

If the other view is to prevail, and only one State is to tax income, by what rule can it be determined which is the proper State to tax it? Certainly priority in the time of levying the tax cannot be the controlling factor, although this record discloses no such priority in favor of either state.

Which State has the prior right to the income tax? The State which protects the property and the custodian of the property, or the State which protects the recipient of the income in the right and enjoyment thereof and in her person?

Is the State of the domicile of the stockholder to be denied its income tax on the dividends, because the corporation is located in another State that taxes the corporation on its income?

Is the State of the domicile of the vendor to be denied its income tax on the vendor who sells at a profit real estate located in another State, because that other State taxes the real estate or the income therefrom?

Is the State of the domicile of the landlord to be denied its income tax on the rents from lands located in another State, because that other State taxes the lands or the income therefrom?

Is not the answer to each question: "Each State may tax those persons and properties that are within its jurisdiction, whether the taxes be laid on the income received by its citizens from property beyond its borders or upon income arising out of and received by its citizens from property within its borders". *Lawrence* v. *Mississippi, supra,* is authority for such an answer.

This court, 286 U. S. 279-280, has said this:

> "The Federal Constitution imposes on the States no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the States unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the State or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment."

It is respectfully submitted that this question has been already decided by *Cohn* v. *Graves, supra*. In that case New York imposed an income tax on one of its residents upon income received from rents of land located

in New Jersey and from interest on bonds physically without the State and secured by mortgages upon lands similarly situated.

It is proper to take issue here with counsel for petitioner in his statement found on page 16 of his brief, where it is said

> "In this *Senior* v. *Braden* case, the court discussed the case of *Maguire* v. *Trefry*, and specifically disapproved that case."

In that case, involving a tax on a property interest in real estate, the court simply said "*Maguire* v. *Trefry* much relied upon by appellees, does not support their position". 295 U. S. 431. Later, however, this court said, in *People ex rel Cohn* v. *Graves, supra,* at page 313:

> "It [a state] may tax net income from bonds held in trust and administered in another State, *Maguire* v. *Trefry, supra,* although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co.* v. *Virginia, supra.*"

Again, in *People ex rel Cohn* v. *Graves, supra,* at 300 U. S. p. 316, this court said:

> "Here the subject of the tax is the receipt of income by a resident of the taxing State, and is within its taxing power, even though derived from property beyond its reach."

That statement is still the law as applied to the same state of facts which also exist here. That case was cited

in the court below by counsel for petitioner as authority that this court "has expressly and plainly taken and stated the view that the same subject matter cannot be taxed by two or more States under the due process clause" (R. bot. p. 18). This statement was challenged by counsel for the Commonwealth of Virginia and the court below took a different view of the case, and relied on the case. It is still insisted that the lower court's opinion of the application of *Cohn* v. *Graves*, *supra*, is sound. The effect of petitioner's argument is that the New York income tax on the income from New Jersey real estate, sustained in *Cohn* v. *Graves*, *supra*, would immediately become invalid should New Jersey impose an income tax on the income from this real estate. It is not believed that the decisions of this court on important constitutional principles rest upon such insecure foundations.

The Fourteenth Amendment should not be so construed as to forbid the Virginia income tax on its resident beneficiary because the income arises from a New York trust account and there has been a New York income tax on the New York trustees. Each State should be permitted to tax those domiciled therein and to base the tax on privileges enjoyed therein, although measured by the same amount of income. The measuring stick is the same, but the characters of the measured privileges are different and the taxable subjects are in different jurisdictions.

B.

The Virginia Income tax against its resident beneficiary does not deny to her the equal protection of the law guaranteed her under the Fourteenth Amendment.

The question raised on page 24 of Brief in support of the petition for the writ of certiorari had not been previously raised or considered in this case. It does not appear in the record and the lower court did not pass upon it. Even now it is presented in a somewhat vague manner by opposing counsel. It is said on page 24 of his petition:

> "The tax is likewise invalid under the Equal Privilege clause of the Fourteenth Amendment."

In the lower court, the only federal question was presented by counsel for petitioner in the following manner, at page 15 of the Record:

> "SECOND. THE ASSESSMENT HERE IF JUSTIFIED UNDER THE VIRGINIA LAW WOULD BE CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.
>
> "The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the *situs* of the income for taxation purposes."

Petitioner's counsel then proceeded to argue the point that the tax in New York and the tax in Virginia was

such double taxation of income as was in violation of the Due Process Clause of the Fourteenth Amendment. At no time prior to his brief in support of his petition for the writ of certiorari was there presented the point that the tax on Mrs. Ryan by Virginia and the exemption under Virginia law of a Virginia tax on the Virginia resident beneficiary of a Virginia trust, not of a New York trust, denies to Mrs. Ryan the equal protection afforded a Virginia resident under other conditions.

It is hereinafter shown that there is no denial of equal protection, but the point is emphatically made that the Virginia courts have not had presented to them, nor has either of them passed upon, this federal question.

The only federal question raised and certainly the only federal question decided appears from the lower court's opinion, R. 51, from which the following is quoted:

> "What we do decide and all we decide is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State."

The opinion of the lower court showed the issues to be, on page 45 of the Record, as follows:

> "Relief from the taxes is sought on two grounds:
> "(1) The Virginia statutes are not designed and intended to tax such income; and
> "(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution."

Nowhere below was there any mention of the "Equal Privilege Clause", or of the Equal Protection of the Law Clause.

Hence this court should not consider the question now.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 268;
Silver v. *Silver*, 280 U. S. 117, 122;
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U. S. 471, 473;
Susquehanna Power Co. v. *State Tax Comr. of Maryland*, 283 U. S. 291, 297;
Aero Mayflower Transit Co. v. *Georgia Public Service Comn.*, 295 U. S. 285, 294.

This federal question, if considered on its merits, should not justify a writ of certiorari.

The counsel for petitioner argues that the New York and Virginia laws with respect to estates are similar; that in neither State is there a tax imposed upon a beneficiary who gets income from a trust when the trustee has discretion as to the amount of the income; that Virginia taxes Mrs. Ryan now, but if the trust had been a Virginia trust no tax would have been imposed upon Mrs. Ryan (although the income would have been taxed to the trustee) and hence she has been denied the equal protection of the law that would be afforded her had the trust been a Virginia trust.

The answer that is sufficient to this argument is simply that this court does not deal in hypothetical cases and there is no such case in reality before this court now. *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54.

All persons situated like Mrs. Ryan are taxed alike, even though persons situated differently may be taxed

differently. There is absolutely nothing in the record to show the denial of equal protection of the law to Mrs. Ryan.

CONCLUSION

It is therefore respectfully submitted that this case is not one calling for the exercise by this court of its supervisory powers, for the following reasons:

(1) The petition for the writ was not filed within the time required by law; and

(2) No right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner.

Wherefore, the petition for the writ of certiorari should be denied.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.
W. W. MARTIN,
Assistant Attorney General.
HENRY R. MILLER, JR.

Richmond, Virginia,
12th of March, 1938.